

A **INTEGRATED CREDIT & LEASING SDN BHD**

v.

KERAJAAN MALAYSIA

B HIGH COURT MALAYA, KUALA LUMPUR
MOHAMAD ARIFF YUSOF JC
[CIVIL APPEAL NO: R2-12-452-2006]
10 OCTOBER 2008

C **REVENUE LAW:** *Income tax - Assessment - Summary judgment - Appeal against - Limitation - Whether notices of assessment time-barred - Whether plea of limitation available to taxpayer - Stare decisis - Triable issues - Income Tax Act 1967, ss. 91(1), 103(1) - Limitation Act 1953, s. 33(1)*

D **LIMITATION:** *Income tax - Whether assessment statute-barred - Appeal against summary judgment - Whether plea of limitation available to taxpayer - Stare decisis - Triable issues - Income Tax Act 1967, ss. 91(1), 103(1) - Limitation Act 1953, s. 33(1)*

E **CIVIL PROCEDURE:** *Summary judgment - Income tax - Appeal against - Whether notices of assessment time-barred - Whether plea of limitation available to taxpayer - Stare decisis - Triable issues - Income Tax Act 1967, ss. 91(1), 103(1) - Limitation Act 1953, s. 33(1)*

F **STATUTORY INTERPRETATION:** *Taxing statute - Income tax - Strict interpretation - Income Tax Act 1967, s. 91(1)*

This was an appeal by the appellant, a private limited company, against a summary judgment under O. 26A of the Subordinate Courts Rules 1980 entered against it by the Sessions Court. The respondent in this instance was the Government of Malaysia. The Director General of Inland Revenue had made the assessments for years of assessment 1986, 1987, 1989 and 1999, apparently dated 26 December 1998 for years of assessment 1986, 1987 and 1989, and 24 August 1999 for year of assessment 1999. The appellant failed to pay the amounts assessed on the dates when they were due and payable and, thus, the sums claimed in the summons included the increased amounts imposed under s. 103(12)(4) and (5A) of the Income Tax Act 1967 ('Act'), corresponding to an increase of 10% and 5% respectively. When the appellant failed to pay the increased amounts due and payable, the respondent filed

a summons and succeeded in recording summary judgment in the Sessions Court. The main thrust of the appellant's case in this appeal was the issue of limitation, the central statutory provision relied upon being s. 91(1) of the Act. The appellant argued that s. 91(1) of the Act should be read, not in isolation, but together with s. 103(1) of the Act, which imposes liability to pay on the taxpayer on the service of the notice of assessment. Therefore, any relevant limitation period (in this case, six years) must be calculated with reference to the date the notices of assessment were served on the taxpayer and that, on the facts of this case, the notices of assessment for years 1986, 1987 and 1989 should be regarded as time-barred.

Held (dismissing the appeal):

(1) Section 91(1) of the Act ought not to be read together with s. 103(1) of the Act as to do so would be to read into the former section an intendment which was simply not there. Reading s. 91(1) of the Act strictly (as this court must, since it was addressing tax legislation), there was no "room for any intendment" in favour of the argument that the limitation period of six years should be calculated from the date of service of the relevant notices. On the contrary, the clear and literal wording of the provision links the six-year period to "expiration" of "year of assessment". There was also no ambiguity that might enable this court to interpret this provision in favour of the taxpayer and against revenue. Indeed, this strict reading of s. 91(1) of the Act is in harmony with s. 33(1) of the Limitation Act 1953 itself. The case of *Kerajaan Malaysia v. Dato' Ghani Gilong* – a Federal Court decision and thus binding on this court – held that a plea of limitation under s. 91 of the Act was not available to the taxpayer in summary judgment proceedings, or for that matter, in some other proceedings in court. Therefore, this court was bound by authority to conclude that the appellant in this appeal could not raise the plea of limitation under s. 91(1) of the Act. The appellant could not thereby submit that a sufficient triable issue was disclosed on the facts of this appeal. Since the plea of limitation was the appellant's central argument, and that argument fell in the light of the statutory provisions and the case law, as a consequence, on the facts of this appeal, there could not be said to exist some other

- A reason for there to be a trial. *Cape Brandy Syndicate v. IRC* (foll); *Kerajaan Malaysia v. Dato' Ghani Gilong* (foll). (paras 32, 33, 37, 41, 42 & 43)

Case(s) referred to:

- B *Affin Bank Bhd v. Edaran Halaman* [2006] 5 CLJ 129 HC (**refd**)
Amanah Merchant Bank Bhd v. Sumikin Bussan Kaisha Ltd [1992] 4 CLJ 2241; [1992] 2 CLJ (Rep) 59 HC (**refd**)
Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC (**refd**)
Cape Brandy Syndicate v. IRC [1921] 1 KB 64 (**foll**)
- C *Comptroller of Income Tax v. A Co Ltd* [1966] 1 LNS 43 HC (**refd**)
Chong Woo Yit v. Government of Malaysia [1989] 2 CLJ 87; [1989] 1 CLJ (Rep) 9 SC (**refd**)
Exxon Chemical (Malaysia) Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2005] 4 CLJ 810 CA (**refd**)
- D *Government of Malaysia v. Abdul Rahman* [1974] LNS 40 HC (**refd**)
Government of Malaysia v. Dato' Mahinder Singh [1966] 5 MLJ 626 (**refd**)
Government of Malaysia v. Lee Tain Tshung [1991] 2 CLJ 1520; [1991] 2 CLJ (Rep) 664 HC (**refd**)
Kerajaan Malaysia v. Abdul Rahim Mohd Aki [1994] 4 BLJ 376 (**refd**)
Kerajaan Malaysia v. Dato' Haji Ghani Gilong [1995] 3 CLJ 161 FC (**foll**)
- E *Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd* [1987] 1 CLJ 246; [1987] CLJ (Rep) 182 SC (**refd**)
Sun Man Tobacco Co Ltd v. Government of Malaysia [1973] 1 LNS 144 (**refd**)

Legislation referred to:

- F Income Tax Act 1967, ss. 91(1), (3), 103(1), (12)(1), (4), (5A), 106, 142, 145(1), (2)
Limitation Act 1953, s. 33(1)
Rules of the High Court 1980, O. 14
Subordinate Courts Rules 1980, O. 26A
- G *For the appellant - M/s Lachaman Lalchand*
For the respondent - Lembaga Hasil Dalam Negeri

Reported by Suresh Nathan

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JUDGMENT

Mohamad Ariff Yusof JC:

- I [1] The appellant, a private limited company, appeals to this court from a summary judgment under O. 26A entered against it by the Sessions Court. The respondent here is the Government of Malaysia. The subject matter of the dispute concerns several

assessments of tax payable by the appellant made by the Director-General of Inland Revenue for the following years: 1986, 1987, 1989 and 1999. The facts as pleaded show that the tax payable for 1989 is an additional assessment, but nothing significant turns on this.

[2] The Sessions Court Judge entered judgment against the appellant for the sum of RM237,776.42 with interest at the rate of 8% per annum until settlement, with costs.

[3] The basic, primary facts of this dispute are plain enough: the Director-General of Inland Revenue made the assessments for years of assessment 1986, 1987, 1989 and 1999, apparently dated 26 December 1998 for years of assessment 1986, 1987 and 1989, and 24 August 1999 for years of assessment 1999, according to the respondent's evidence. The appellant failed to pay the amounts assessed on the dates when they were due and payable and therefore the sums claimed in the summons included the increased amounts imposed under s. 103(12)(4) and 103(5A) of the Income Tax Act 1967, corresponding to an increase of 10% and 5% respectively. When the appellant failed to pay the increased amounts due and payable, the respondent filed summons and succeeded in recording summary judgment in the Sessions Court.

[4] The appellant appealed to this court, submitting through counsel that there are triable issues in this case, and additionally that this is a fit and proper case for the court to find that there are "some other reasons for a trial to be had" Mr Roy Sreenevasan, counsel for the appellant was particularly diligent in outlining and emphasizing the elements in the subsidiary facts in this dispute that lend support to the appellant's case that there are triable issues and reasons for there to be a trial of the claim by the Government of Malaysia. Quite predictably, Cik Naemah, counsel for the respondent, disputed this stand vigorously. According to Cik Naemah, s. 103(1) of the Income Tax Act is clear: tax assessed becomes due and payable upon service of a notice of assessment, whether or not the tax payer appeals against the assessment, citing *Chong Woo Yit v. Government of Malaysia* [1989] 2 CLJ 87; [1989] 1 CLJ (Rep) 9, *Comptroller of Income Tax v. A.Co. Ltd* [1966] 1 LNS 43, *Government of Malaysia v Dato' Mahinder Singh* [1966] 5 MLJ 626, *Kerajaan Malaysia v. Abdul Rahim bin Mohd Aki* [1994] 4 BLJ 376, *Sun Man Tobacco Co Ltd*

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- A *v. Government of Malaysia* [1973] 1 LNS 144 and *Government of Malaysia v. Lee Tain Tshung* [1991] 2 CLJ 1520; [1991] 2 CLJ (Rep) 664.

Sections 103, 106, 142 And 145 Of The Income Tax Act

- B [5] Section 103(12)(1), of course, provides:

C Subject to this section, tax payable under an assessment or a composite assessment shall on the service of the notice of assessment or a composite assessment on the person assessed, other than a company to which Section 103A applies, be due and payable at the place specified in that notice whether or not that person appeals against the assessment.

- D [6] On the facts of this appeal, sub-sections (4) and (5A) of s. 103 are likewise applicable, and these provisions too are express and clear. Section 103(12)(4) reads:

E ... where any tax due and payable on the service of a notice in accordance with subsection(1) ... has not been paid within thirty days after the service of that notice (or within such longer period as may be allowed by the Director General), so much of the tax as is unpaid upon the expiration of those days or that period, as the case may be, shall without further notice being served be increased by a sum equal to ten percent of the tax so unpaid, and that sum shall be recoverable as if it were tax due and payable under the Act.

- F [7] This statutory power vested in the Director General to increase the tax payable for non-payment on its due date, is augmented by s. 103(12)(5A) which states:

G Where the tax due and payable has been increased under subsection (4) ... any balance remaining unpaid upon expiration of sixty days from the date of such increase shall without any further notice being served be further increased by a sum equal to five percent of the balance unpaid, and that sum shall be recoverable as if it were tax due and payable under this Act.

- H [8] Mention must also be made of s. 106 of the Income Tax Act, which provides in its material parts, as follows:

I (1) Tax due and payable may be recovered by the Government by civil proceedings as a debt due to the Government.

...

In any proceedings under this section the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased ...

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[9] Section 142 (on “Evidential Provisions”) strengthens s. 106 by providing that in any suit brought under s. 106, the production of a certificate signed by the Director General giving the name and address of the defendant and the amount of tax due from him “shall be sufficient evidence” of the amount due and “sufficient authority” for the court to give judgment for the amount certified. On the facts of this appeal, such a certificate was adduced in evidence. See exh. YTW5, p. 32 of the appeal record.

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[10] The law is therefore quite clear. As commented by Abdul Aziz bin Mohamed J (as he then was) in *Kerajaan Malaysia v. Abdul Rahim Mohd Aki* [1994] 4 BLJ 376, “in any civil proceedings to recover income tax allegedly due and payable, the court must close its ears and shut its eyes to any suggestion or indication that the amount claimed is excessive or incorrectly assessed.” (at p. 3) In the same light, the normal rules on triable issues under summary judgment cannot apply, since the tax payer cannot be allowed to argue that the amount being recovered as a civil debt is excessive, incorrectly assessed or incorrectly increased. Arulanandom J in *Government of Malaysia v. Abdul Rahman* [1974] 1 LNS 40 stated in a dictum:

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When proceedings are commenced under O. 14 the normal rules for triable issues do not apply to cases of this nature because of the provisions of the Income Tax Act. Normally when defence raised triable issues it is a rule of law that unconditional leave to defend should be given but under section 106(3) of the Income Tax Act it clearly states that in any proceedings commenced by the Government under Section 106(1) of the Act for the recovery of tax by civil proceedings as a debt due to the Government the Court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under Section 103(4) or (5) (at page 276).

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[11] This dictum was approved by the Supreme Court in *Chong Woo Yit v. Government of Malaysia* [1989] 2 CLJ 87; [1989] 1 CLJ (Rep) 9.

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- A [12] The case for the Government of Malaysia, the respondent here, thus appears to be securely anchored as far as the law is concerned, once the respondent succeeds in proving by affidavit evidence the fact of service of the notices of assessment for years of assessments 1986, 1987, 1989 and 1999. As far as the
- B increased amounts are concerned, the law dispenses with service of any notice of increase. Although, the appellant disputed the quantum of assessment in the affidavits in reply, appellant's counsel appeared to have abandoned (and rightly so) any submission based on incorrect assessment or increase.
- C [13] Additionally, the respondent relied on s. 145(1) and (2) on the deeming provisions on service by post.
- D [14] Under s. 145(1), notices issued may be served personally or by ordinary or registered post. Subsection (2) further provides:
- E A notice relating to tax which is sent by ordinary or registered post shall be deemed to have been served on the person (including a partnership) to whom it is addressed on the day succeeding the day on which the notice would have been received in the ordinary course of post if it is addressed:
- (a) in the case of a company, partnership or body of persons having a registered office in Malaysia:
- (i) to that registered office;
- F (ii) to its last known address; or
- (iii) to any person authorized by it to accept service by process;
- ...
- G [15] In a nutshell, the respondent relies on the fact of service as the determining factor in establishing liability under the scheme of the Income Tax Act. Once served, the taxpayer has to pay within thirty days after service. Where the taxpayer fails to pay, the
- H amount due and payable can be recovered in civil proceedings as a debt due to the Government of Malaysia. The underlying rationale seems plain: there has to be certainty in tax collection and therefore an assurance of cashflow to the Government. If the taxpayer is dissatisfied with the assessment, he has to follow the
- I statutory mechanism of review and appeal within the scheme of the Act. The normal rules on summary judgment in relation to the raising of triable issues on correctness of assessment, cannot apply.

[16] Mr Roy, for the appellant, approached this appeal on a different footing. I had asked Mr. Roy in the course of his submission whether the main thrust of the appellant's case was the issue of limitation. Learned counsel replied and agreed that the nub of the issue, as far as the appellant was concerned, lay in the law on limitation. From this basic premise, appellant's counsel submitted that there were triable issues raised and the existence of some other reason for there to be a trial.

The Facts Relating To Service

[17] What then are the relevant facts relating to the service of the relevant Notices of Assessment? According to the respondent's evidence, the Notices of Assessment for years of assessment 1986, 1987 and 1989 were all dated 26 December 1998. For year of assessment 1999, the Notice of Assessment was dated 24 August 1999.

[18] According to the appellant, its tax agent received a telephone call from the respondent on 11 February 1999. The respondent complained to the tax agent that they were apparently unable to serve documents on the tax agent's address, a post office box number, in Kuala Lumpur. The respondent then requested the appellant's tax agent to collect a letter together with four separate notices of assessment for the years 1985, 1986, 1987 and 1989. All the notices (Forms J and JA (for year 1989)) were dated 26 December 1998. According to the appellant's evidence as shown in the affidavit in reply filed, the letter and the notices were received by its tax agent only on 12 February 1999. According to the appellant, the relevant notices were therefore only served on the appellant on 12 February 1999.

[19] With respect to the failure to serve through the PO Box address of the tax agent, the appellant questioned how it was possible that the notices sent to a PO Box address could be returned to the respondent. "Inherently incredible," said Mr. Roy. He added by submitting that the "inescapable conclusion" was that the respondent did not serve the Notices of Assessment through the PO Box address.

- A [20] In the meantime (between the date on the Notices of Assessment and the actual date of collection and receipt of these notices by the tax agent), s. 91(1) of the Income Tax Act, as amended, had come into force on 1 January 1999. Whereas previously, the limitation period applicable was 12 years, with effect from 1 January 1999 the period was shortened to six years.
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[21] Given the facts as outlined, appellant's counsel posed the following questions:

- C 1. Whether the date of an Assessment is based on the date of the Notice of Assessment or the Date the Notice of Assessment is served?
2. Whether a time bar period of 6 years or 12 years is applicable?
- D 3. Whether or not the deeming provision in Section 145 of the ITA is applicable when the Respondent could not possibly have posted the Notices?
4. Whether or not the Respondent was unable to serve the documents on a P.O.Box located at the General Post Office?
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The Limitation Argument

- [22] The central statutory provision relied on by counsel for the appellant is of course s. 91(1), which was amended and came into force on 1 January 1999. The amendment substitutes a limitation period of 12 years with a shorter period of six years. Given the importance attached to this provision in this appeal, it becomes necessary to cite and scrutinize this provision in full. The amended provision now reads:
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- G The Director General, where **for any year** of assessment it appears to him that no or no sufficient assessment has been made on a person chargeable to tax, **may in that year** or **within six years after its expiration** make an assessment or additional assessment, as the case may be in respect of that person in amount or additional amount of chargeable income and tax or in the additional amount of tax in which, according to the best of the Director General's judgment, the assessment with respect to that person ought to have been made for that year. (emphasis added)
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[23] Counsel for the appellant argued that s. 91(1) should not be read in isolation. On the contrary, the section should be read together with s. 103(1) which imposes liability to pay on the taxpayer on the service of the notice of assessment. Therefore, any relevant limitation period (in this case, six years) must be calculated with reference to the date the notices of assessments were served on the taxpayer. The relevant date, according to the appellant's argument, had to be 12 February 1999. Since 12 February 1999 is the relevant date, the notices of assessment for years of assessment 1986, 1987 and 1989 should be regarded as time-barred. Of course had s. 91(1) not been amended, the old limitation period of 12 years would have applied.

[24] As I have indicted earlier in this judgment, the respondent's position disregards the date of service; what is important, according to the respondent, is the date the notices of assessment were made, namely 12 February 1999. 12 February 1999 is a date before the amendment came into force and therefore, the limitation period of 12 years should apply.

[25] The appellant's response to the respondent's position was put forcefully in counsel's submission as follows:

On a public policy point, it would be a rogue's charter if the date of the Notice is deemed to be the date of assessment. This would lead to unchallenged backdating at the whim of the Respondents, making a mockery of the limitation provisions in the ITA.

[26] In the course of his submission, appellant's counsel also impressed on this court that a limitation period must necessarily be calculated from a date a cause of action arises. On the facts of this appeal, the respondent conceded that proceedings for recovery of taxes due could only be brought after the appellant had been served with the Notices of Assessment and failed to pay within the statutory period in line with the requirements of s. 103(1) of the Income Tax Act.

Summary Judgment Principles

[27] The principles governing summary judgment application are well settled. At first blush, the appellant's arguments appear convincing. This appears not to be a plain and obvious case for summary judgment to be entered. There are a number of issues of mixed facts and law to warrant this court to seriously consider

- A whether this appeal should be allowed and for this matter to be remitted back to the Sessions Court for a full and more deliberate submission on the issue of limitation, after a factual finding is made on the exact date when the Notices of Assessment for 1986 and 1989 were made, when they were posted to the PO Box address of the tax agent and how was it that letters sent to a PO Box address could be returned to sender. In passing, I had asked respondent's counsel when the Notices of Assessment were posted, to which she replied that this fact was not mentioned in any of the affidavits filed by the respondent.

- C [28] However, the principles on summary judgment applications also include one principle of direct relevance to this case, namely when a "clear-cut issue of law" is raised, or when the court is satisfied that the issue of law is "really unarguable", the court should decide the issue of law in an O. 14 hearing: *Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd* [1987] 1 CLJ 246; [1987] CLJ (Rep) 182. See also *Amanah Merchant Bank Bhd v. Sumikin Bussan Kaisha Ltd* [1992] 4 CLJ 2241; [1992] 2 CLJ (Rep) 59 and *Affin Bank Bhd v. Edaran Halaman* [2006] 5 CLJ 129. The Supreme Court in *Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 stated this principle in the following terms:

- F Where the issue raised is solely a question of law without reference to any facts or where the facts are clear and undisputed, the Court should exercise its duty under O. 14. If the legal point is understood and the court is satisfied that it is unarguable, the court is not prevented from granting summary judgment merely because 'the question of law is at first blush of some complexity and therefore takes a little longer to understand'. (per Mohamed Azmi SCJ at p. 408)

- H [29] As agreed by counsel for the appellant, the nub of this appeal lies in the issue of limitation as a question of law. It is not seriously disputed that the relevant notices were served, the only point of dispute being when exactly were they served? I therefore ask myself this basic question: Is the limitation issue understood and is it unarguable as a question of law? To answer this basic question, it becomes necessary to refer to principles of statutory interpretation as applied to tax legislation as well as be mindful of case law authority that have articulated the applicability of the issue of limitation in tax recovery cases.

Statutory Interpretation In Tax Legislation

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[30] In the English case of *Cape Brandy Syndicate v. IRC* [1921] 1 KB 64, the applicable principles are stated with customary clarity:

... in a taxing Act, one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing to be implied. One can only look fairly at the language used. (at p 71)

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[31] I have also reminded myself that our Court of Appeal in *Exxon Chemical (Malaysia) Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2005] 4 CLJ 810, have adopted an apparently less rigid approach when the court held:

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... the principle that a provision in a taxing statute must be read strictly is one that is to be applied against revenue and not in its favour. The maxim in revenue law is this: no clear provision; no tax. If there is any doubt then it must be resolved in the taxpayer's favour. (per Gopal Sri Ram, JCA at p 779)

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[32] Is there an ambiguity in the amended s. 91(1) of the Income Tax Act? I am not persuaded by appellant counsel's argument that s. 91(1) should be read together with s. 103(1). To do so will be to read into the former section an intendment which is simply not there.

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[33] Reading s. 91(1) strictly (as I must, since I am addressing a tax legislation), I find no "room for any intendment" (to paraphrase the words in *Cape Brandy*) in favour of the argument that the limitation period of six years should be calculated from the date of service of the relevant notices. On the contrary, the clear, literal wording of the provision links the six year period to "expiration" of "year of assessment". If there is an ambiguity, there might be some room to interpret this provision in favour of the tax payer and against revenue, but I cannot find any ambiguity. Indeed, this strict reading of s. 91(1) is in harmony with s. 33(1) of the Limitation Act 1953 itself. This is how s. 33(1) reads *in extenso*:

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A **33. Application to the Government**

(1) Save as in this Act otherwise provided and without prejudice to the provisions of section 3 of this Act, this Act shall apply to proceedings by or against the Government in like manner as it applies to proceedings between subjects and for the purposes of this Act a proceeding by petition of right shall be deemed to be commenced on the date on which the petition is presented:

Provided that this Act shall not apply to any proceedings by the Government for the recovery of any tax, duty or interest thereon or to any forfeiture proceeding under any written law in force in Malaysia relating to customs duties or excise or to any proceedings in respect of the forfeiture of a ship ...

[34] This important provision in the Limitation Act has not escaped the attention of Malaysian courts, and I now turn to the relevant case law.

The Case Law

[35] Both counsel cited the Supreme Court decision in *Chong Woo Yit v. Government of Malaysia* [1989] 2 CLJ 87; [1989] 1 CLJ (Rep) 9, in the course of their submissions. I do not see how this authority can assist the appellant's case, since it was held in this case that limitation as such did not apply to any proceedings for the recovery of tax. The court in fact referred to s. 33(1) of the Limitation Act.

[36] In the course of argument, counsel for the respondent relied *inter alia*, on the High Court decision in *Government of Malaysia v. Dato' Mahinder Singh* [1996] 5 MLJ 626. Arifin Zakaria J (as he then was) addressed the issue of limitation in this case. It is noteworthy that this case concerned an O. 14 application. The relevant passage and holding on the issue of limitation appear on p. 633-634 of the report, and I quote:

... On the issue of limitation the answer may be obtained from the judgment of the Federal Court in the case of *Kerajaan Malaysia v. Dato' Ghani Gilong* ... In that case, Edgar Joseph Jr, FCJ after considering the decision of Gill CJ in *NTS Arumugam Pilai v. Government of Malaysia* ... came to the following conclusion ...:

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In our view, the High Court has no power to entertain a plea of limitation under s. 91(1) and (3) of the Act advanced by a taxpayer. However the special commissioners have such power ...

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In my view that completely answers the question of limitation raised by the defendant.

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[37] *Kerajaan Malaysia v. Dato' Haji Ghani Gilong* [1995] 3 CLJ 161 is a Federal Court decision, and therefore binding on this court. I cannot see how the holding on limitation in this Federal Court case can be distinguished on the special facts of this instant appeal. Like the instant appeal, *Ghani Gilong* concerns a summary judgment application. The taxpayer there was assessed to income tax and increase of income tax under s. 103(12)(4), (5) and (5A) for years of assessment 1970-1973 and 1982-1984. When hearing the O. 14 application, the High Court judge had accepted the taxpayer's contention that the sum corresponding to an additional assessment for the year 1971 was barred by limitation by virtue of s. 91(1), and accordingly deducted this sum from the total claim. On appeal, the Federal Court held that the High Court did not have the power to entertain the plea of limitation under s. 91 of the Income Tax Act.

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[38] The relevant passage in *Ghani Gilong* reads:

In our view, the High Court has no power to entertain a plea of limitation under subsections 1 and 3 of the Act advanced by a taxpayer. However, the Special Commissioners have such power. Our reasons for these conclusions now follow.

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If counsel for the taxpayer were correct in his contention that the plea of limitation based on sub-sections 1 and 3 of s. 91 of the Act is available to him in proceedings for recovery of tax brought in court as well as in proceedings before the Special Commissioners, then a decision by the High Court on the question of limitation would prevent the Special Commissioners from deciding the same question as they would regard themselves as bound by decision of the High Court thereby abdicating their fact finding function of determining whether there had been fraud or willful default within the meaning of sub-section 3 (a) of s. 91 of the Act. Alternatively, even if the Special Commissioners do not regard themselves as so bound, it could lead to inconsistent decisions by the High Court and the Special Commissioners on the identical question ... (per Edgar Joseph Jr, FCJ at p. 168)

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- A [39] It is clear from the Federal Court's reasoning that the Special Commissioners are the persons with "the function of fact finding". The conclusion reached by the Federal Court appears tied up with its reading of not only sub-section 1, but also sub-section (3) of s. 91. Just as the Special Commissioners have the
- B power to find whether an assessment is excessive or correct when a taxpayer appeals to it, it appears that they also have the power to decide on an issue of limitation.
- C [40] Sub-section (3) of s. 91, of course, refers to the power to decide as a question of fact whether there has been any form of fraud, willful default or negligence on the part of the taxpayer, in which event the limitation period in sub-section(1) will not apply and the Director-General make an assessment "at any time".
- D [41] Although on the facts of this instant appeal, no question on sub-section (3) arises, I cannot see how this fact can make any difference to the general holding of the Federal Court that a plea of limitation under s. 91 is not available to the taxpayer in summary judgment proceedings, or for that matter in some other proceedings in court.
- E [42] I am therefore bound by authority to conclude that the appellant in this appeal cannot raise the plea of limitation under s. 91(1). The appellant cannot thereby submit that a sufficient triable issue or issues are disclosed on the facts of this appeal.
- F [43] Since the plea of limitation is the central argument of the appellant, and that argument must fall in the light of the statutory provisions and case law, I also find, as a consequence, that on the facts of this appeal, there cannot be said to exist some other
- G reason for there to be a trial.
- H [44] Lest it be thought that the outcome of this appeal suffers from excessive literalism with scant regard for equity for the taxpayer, it is necessary to clarify that the holding in *Government of Malaysia v. Hj. Ghani Gilong* does not appear to completely shut the doors of justice to the taxpayer who may have a legitimate issue on limitation to ventilate against the revenue authorities. The taxpayer can still raise the issue if he avails himself of the statutory mechanism of appeal to the Special Commissioners under the Income Tax Act, and through this mechanism the issue on
- I limitation can still find its way to a court of law by way of case stated.

[45] On this point, the Federal Court in *Ghani Gilong* stated:

In so holding, we do not overlook the point that further appeals lie to the High Court by way of case stated on a point of Law, against the decision of the Special Commissioners pursuant to para 34 of Schedule 5 to the Act, and thereafter, to the Federal Court. Therefore, it is perfectly possible that the plea of limitation in this case may ultimately arise for determination by this Court, but this would be by a different route ... (at p. 1474)

[46] In light of the facts and the established state of the law analysed earlier, I dismiss this appeal with costs.

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